No. 87-2036

In The

Supreme Court of the United States

October Term, 1988

JANET HEROLD,

Petitioner,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT RULE 28.1 STATEMENT

At the time of the railroad crossing accident in 1974 which gave rise to these procedings, Respondent was known as Burlington Northern, Inc. Following a corporate reorganization, Respondent became Burlington Northern Railroad Company, and its newly created parent corporation was called Burlington Northern, Inc. Burlington Northern Railroad Company has two affiliates, Burlington Resources, Inc., and Burlington Northern Motor Carriers, Inc. The partially owned subsidiaries of Burlington Northern Railroad Company are:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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SUMMARY OF ARGUMENT

Mrs. Herold has no standing to complain of the order of remittitur issued by the District Court in this case because she

rejected that remittitur. The Petitioner's refusal of the remittitur and decision to have her claim for loss of consortium presented at a second jury trial have the same effect as if the District Court had granted a new trial unconditionally, and therefore Mrs. Herold has no direct and substantial personal interest in changing current remittitur practice.

Even if Mrs. Herold does have standing to raise this issue, she is in error in contending that this Court has never addressed the practice of remittitur in the context of the Seventh Amendment's grant of a right to jury trial. To the contrary, this Court has endorsed remittitur practice in several cases, and that practice is now universally accepted in the federal courts.

A trial court's ability to condition the grant of a new trial on the plaintiff's refusal to accept a remittitur of the jury award promotes efficient judicial administration by avoiding unnecessary jury trials. Moreover, the pracitice of remittitur is an important adjunct to the right to trial by jury, allowing the trial judge to correct jury excesses when they occur.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. MRS. HEROLD REFUSED THE REMITTITUR, AND THUS HAS NO STANDING TO COMPLAIN THAT REMITTITUR IS AN UNCONSTITUTIONAL PRACTICE.

The history of the proceedings below as recounted in Janet Herold's Petition for Writ of Certiorari reveals that in the first trial in December 1983 the jury returned a verdict of $2 million for Mrs. Herold's loss of consortium. Following post-trial motions by the Burlington Northern, the District Court explicitly held that the verdict for loss of consortium was "contrary to the great weight of the evidence." (App. at A9) By implication, in citing improper evidence which influenced the size of the verdict and in ordering a remittitur of 85%, the District Court also held

that the $2 million consortium award was excessive. (App. A9-A10)

To cure these defects, the District Court ordered a new trial on the issue of damages for loss of consortium unless Mrs. Herold accepted a remittitur in the amount of $1.7 million, leaving an award of $300,000. Mrs. Herold refused to accept the remittitur, and at a second jury trial in January 1987 on her claim for loss of consortium, she was awarded $500,000.

In her Petition for Writ of Certiorari, Mrs. Herold argues that the District Court used the remittitur to impose on her its own views of a reasonable damage award, thus violating her constitutional right to trial by jury.[1] This argument might have some surface plausibility if in fact the remittitur had been accepted by Mrs. Herold and she was now complaining that it was an arbitrarily low amount. But Mrs. Herold did *not* accept the remittitur, and thus the constitutionality of remittitur practice is not properly before this Court.

A party has standing to seek review of the judgment of a Court of Appeals if, on such review, this Court has before it an actual controversy in the outcome of which the party has a "direct and substantial personal interest." *Chicago v. Atchison, Topeka & Santa Fe Railway Company*, 357 U.S. 77, 83 (1958). Mrs. Herold has no direct and substantial personal interest in changing current remittitur practice because she cannot show that it has had any adverse impact on her.

The District Court was fully entitled to grant Burlington Northern a new trial outright on the dual grounds that the verdict was against the weight of the evidence and was also excessive. It is beyond peradventure that both of these grounds for new trial are within the scope of Rule 59 of the Federal Rules of Civil Procedure and have deep roots in English common law. 6A *Moore's Federal Practice*, 2d ed., § 59.08[1], pp. 59-80 to 59-81 (1987). *Montgomery Ward and Company v. Duncan*, 311 U.S. 243 (1940). The District Court was not obligated to suggest a remittitur. Yet Mrs. Herold argues that because it did combine

[1]Petition, p. 14.

its grant of a new trial with an order of remittitur--a remittitur which she refused--she has somehow been prejudiced.

Mrs. Herold lacks standing to complain of the remittitur because the remittitur was essentially irrelevant to her present status. It has certainly had no adverse impact on her right to trial by jury. If there had been no remittitur practice as an option available to the District Court, it would most certainly have ordered an unconditional new trial. The right to trial by jury does not mean that the jury verdict is free from supervision by the trial judge. Mrs. Herold's constitutional rights were not violated by virtue of her having to undergo a second trial, her protestations to the contrary notwithstanding.[2]

II. THE PRACTICE OF REMITTITUR HAS BEEN SPECIFICALLY UPHELD IN THE FACE OF CONSTITUTIONAL CHALLENGE.

In her Petition, Mrs. Herold argues that the practice of remittitur has never been subjected to "critical examination" in the context of the Seventh Amendment's command that "no fact tried by a jury shall be otherwise reexamined ... than according to the rules of the common law."[3] Although this Court may not have previously analyzed remittitur in a fact situation identical to this case, it has had many opportunities to respond to attacks on remittitur grounded in the Seventh Amendment. On each such occasion it has confirmed the validity of this practice.

Thus, in *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886), the Railroad complained that in reducing Herbert's verdict from $25,000 to $10,000 on remittitur, the trial court had by "necessary implication" found that the "issues in the case had not been tried by such jury as the law contemplates." 116 U.S. at 642. This Court rejected that argument and gave broad approval to the concept of remittitur:

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[2]Petition, pp. 15-16.

[3]Petition, pp. 7-8.

> The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could therefore, be properly allowed to stand.

116 U.S. at 646-647.

A similar result was reached three years later in *Arkansas Valley Land and Cattle Company v. Mann*, 130 U.S. 69 (1889). In that case the losing party below contended specifically that to make the grant of a new trial contingent on refusal of remittitur was a violation of the Seventh Amendment because it constituted a reexamination of facts tried by the jury. This Court disagreed, holding that there is no practical distinction between, on the one hand, the trial court's power to set aside a verdict when it finds damages excessive, and on the other hand, its power to determine the extent to which the damages are excessive and offer the plaintiff an opportunity to cure that defect:

> The practice which this court approved in *Northern Pacific Railway Company v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot by disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. [Citations omitted] But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority

> of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint.

130 U.S. at 74.

The Seventh Amendment was again directly at issue when the Court addressed the constitutionality of the practice of additur in *Dimick v. Schiedt*, 293 U.S. 474 (1935). Finding no precedent for it in English common law, the Court held that additur was in fact violative of the Seventh Amendment. But the Court went on to address the distinction between additur and remittitur and provided a compelling rationale for the practice of remittitur which continues to the present date:

> Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and that the remittitur has the effect of merely lopping off an excrescence.

293 U.S. at 486.

Since the decision in *Dimick*, remittitur has enjoyed "universal" acceptance in the federal courts, and a declaration that it is

unconstitutional would require "a judicial uprooting of precedent akin to that effected by *Erie-Tompkins*." 6A *Moore's Federal Practice*, 2d ed., § 59.08[7], pp. 59-189 to 59-191 (1987). Indeed, more recent pronouncements by this Court and lower federal courts indicate that remittitur is regarded as a settled question. Thus, for example, this Court has stated that if a damage award is excessive, "it is the *duty* of the trial judge to require a remittitur or new trial." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65-66 (1966) (emphasis added). *See also, Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1042-1043 (5th Cir. 1970); *Mooney v. Henderson Portion Pack Company*, 339 F.2d 64 (6th Cir. 1964).

III. THE PRACTICE OF REMITTITUR CONTRIBUTES TO JUDICIAL ECONOMY AND EFFICIENCY, AND IS A NECESSARY ADJUNCT TO THE RIGHT TO TRIAL BY JURY.

Even if Mrs. Herold had standing to complain of the remittitur ordered by the district Court in this case, and even if the practice of directing a reduction of an excessive jury award as an alternative to a new trial were not supported by a line of legal precedent dating back to *Blunt v. Little*, 3 Mason 102, in 1822, there would be no basis for discarding this practice today. Modern day litigation in the United States is too often an expensive, cumbersome, time-consuming affair which exhausts the patience and the pocketbooks of those who are parties to it. Numerous states have recognized the value of remiititur as a way to avoid unnecessary, repetitive jury trials, and have sanctioned its use by court decision or by statute.[4]

More importantly, Mrs. Herold's readiness to eliminate or substantially modify the practice of remittitur betrays a lack of understanding of the important role played by judges, in cooperation with juries, in the administration of justice. If the

[4]Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 Yale Law Journal 318, fn's 2,5 (1934).

practice of remiititur is objectionable, why not also eliminate a judge's ability to unconditionally order a new trial if the damages are excessive? Why permit a judge to grant a new trial if he deems the verdict against the weight of the evidence? The answer is found in the maxim that just as no individual is infallible, so a group of individuals, assembled as a jury, is capable of error. The experience and wisdom of the trial judge, who has had the opportunity to observe the witnesses and sift the evidence, is sometimes an essential counterbalance to the actions of a misguided jury. This fact was recognized by Justice Mitchell of the Pennsylvania Supreme Court in *Smith v. Times Publishing Company*, 36 A. 296 (Pa. 1897):

> The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice, -- a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly.

36 A. at 298. A similar observation was made by Chief Justice Tindal in *Mellin v. Taylor*, 3 BNC 109, 132 Eng. Reports 351:

> I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied for: On the contrary, I think that, without some power of this nature residing in the breast of the Court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public.

In sum, the right to grant a new trial is "not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Causalty & Surety Company v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941). The same principle applies to the practice of remittitur. Like the United States Constitution, the effective operation of the American judicial system depends on a system of checks and balances, with citizen juries supervised by jurists trained in the law. Remittitur has been a part of that system for the duration of this country's history, and Petitioner has presented no valid argument for its abandonment.

CONCLUSION

For each of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 13th day of July, 1988.

Respectfully submitted,

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